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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 514.

W. E. GAMBLE, Administrator De Bonis Non of the Estate of W. J. Gamble, Deceased,
Petitioner,

v.

R. J. GAMBLE and ANNA DORA GAMBLE,
Respondents.

BRIEF

For Respondents Opposing Petition for Certiorari.

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This case represents the third appearance of this litigation before the Supreme Court of Georgia, each decision there being adverse to petitioner. In all three appearances the parties were the same, the causes of action were the same, and the same property was involved. See opinion of the Supreme Court of Georgia (R. 18).

The only pretense that this case involves a federal question grows out of a contention by petitioner that since the respondents' plea of res adjudicata was not verified, a

judgment based thereon deprived petitioner of his Constitutional rights. The Supreme Court of Georgia found, however, that this was harmless error, and in fact took judicial notice that petitioner could not recover in any event. It is this finding of which petitioner complains which, in effect, amounts to no more than a contention that the doctrine of "harmless error" is itself unconstitutional. This, it is said, presents a federal question.

So far as we know, the rule of "harmless error" has been uniformly recognized and applied by all reviewing courts, both Federal and State, since the foundation of our government.

Pugh v. McCormick, 81 S. Ct. 361, 14 Wall. 361, 20 L. Ed. 789;
Carlisle Packing Co. v. Sandanger, 42 S. Ct. 475, 259 U. S. 225, 66 L. Ed. 927;
West v. Camden, 135 U. S. 507, 521, 34 L. Ed. 254, 258, 10 S. Ct. 838.

Certainly it has been applied many times by the Supreme Court of Georgia, and there is nothing unconstitutional, or even new or unusual in its application to the facts of the present case. See the following Georgia cases in which the doctrine has been applied:

Southern Cotton Oil Co. v. Thomas, 155 Ga. 99 (117 S. E. 456);
Smith v. McWhorter, 173 Ga. 255 (160 S. E. 250).

Moreover, after proof of a plea before the jury, the question of its preliminary verification has become moot; especially where it can be judicially noted that petitioner already knew both of the existence and truth of its contents and that the same judgment must follow in any event. A reference to the record will show that the unverified plea of res adjudicata of which petitioner complains

consisted entirely of a transcript of the record in a previous suit between the same parties and upon the same subject matter and action, all of such contents being matters of public record to which a verification could not possibly add additional dignity. The record will also show that the petitioner himself must have had actual knowledge both of the existence and truth of these records, since he had been a party to the case in which they were made, a great many of the pleaded exhibits consisting of his own sworn pleadings in the former case. It further appears that on the trial of the plea the original copies of all these former pleadings were introduced in evidence. Thus it conclusively appears that petitioner could not possibly have been harmed by a failure to verify, since the truth of the allegations must of necessity have been well known to him. The Supreme Court of Georgia also took judicial notice of the fact that the suit was barred and that petitioner could not recover in any event.

We recognize, of course, that all of these questions were matters for the determination of the state court and go to the merits of the case rather than the granting of certiorari. We cite them, however, merely to show that unless this Court should determine that the doctrine of "harmless error" is inherently unconstitutional, no federal question could conceivably be involved. Accordingly, we submit that the petition for certiorari here contains no matters of such special importance or of any federal question of substance not heretofore dealt with by this Court, or other reasons, as would warrant this Court in its sound judicial discretion to entertain this writ.

Since it appears that this is the third appearance of this case in the Supreme Court of Georgia, and since, as that Court has said, "this litigation has been pending since 1941, although it should have terminated with the first judgment," respondents respectfully request that this

Court award damages for delay as authorized by Section 2103 of the Judicial Code (28 U. S. C. A., 2103). See **Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226, 43 S. Ct. 589, 67 L. Ed. 961.**

Respectfully submitted,

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